84 - 1332

Office - Supreme Court, U.S.
FILED
FEB 20 1985
ALEXANDER STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

MICHAEL LOUIS MINNS
MICHAEL LOUIS MINNS, P.L.C.
20214 Braidwood, Suite 100
Katy, Texas 77450

Attorney for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

45pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION I: To what extent, if any, can a prosecutor utilize Grand Jury statements at the trial level to:

A) Imply the Defendant has already been found guilty at the Grand Jury level;

B) Personally give his unsworn version of what took place in front of the Grand Jury; and

C) Imply a Co-defendant upon whose testimony the Defendant's case relies is dishonest;

All when the statements are offered without a showing of an exception to the secrecy of the Grand Jury proceedings or to hearsay rules?

Was the Fifth (5th) Amendment right to due process, and a Grand Jury Indictment intended to be a prosecution tool? Is the use of Grand Jury testimony in trial against the Petitioner, who was not present before the Grand Jury, a violation of the Fifth (5th) Amendment and Fourteenth (14th) Amendment, due process, and Sixth (6th) Amendment, right to counsel and cross-examination?

QUESTION II: Can a conviction be maintained if the uncontroverted evidence shows no ability on the part of the Defendant to comply with the statute?

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Table of Authorities	III
Opinions Below	1
Statement of Grounds on Which Jurisdiction of this Court is Invoked	2
Statutes Involved	2
Summary of the Case	2
Statement of the Case	3
Reasons for Allowance of the Writ	29
Conclusion	30
Appendix "A"	1a
Appendix "B"	7a
Appendix "C"	9a

TABLE OF AUTHORITIES

CASES

	Page
Alford v. State, 258 S.W.2d 817 (Ct. of Crim. App. of Tx., 1953)	18
Bartley v. U.S., 319 F.2d 717 (Dist. of Columbia Circuit, 1963)	4, 21, 22
Bruton v. U.S., 88 S.Ct. 1620 (1968)	18
Collins v. U.S., 383 F.2d 296 (10th Cir. 1967)	22
Commonwealth v. Peay, 85 A.2d 425 (S.Ct. of Penn. 1951)	17, 18
Edwards v. U.S., 321 F.2d 324 (5th Cir. 1963)	24
Young v. U.S., 214 F.2d 232 (Dist. of Columbia Circuit, 1954)	19, 20, 21, 22
U.S. v. Anderson, 577 F.2d 258 (5th Cir. 1978)	4, 5
U.S. v. Conforte, 624 F.2d 869 (9th Cir. 1980)	23
U.S. v. Escamilla, 666 F.2d 126 (5th Cir. 1982)	14
U.S. v. Gilliam, 484 F.2d 1093 (Dist. of Columbia Circuit, 1973)	5, 21, 22
U.S. v. Goodman, 190 F.Supp. 847 (U.S. Dist. Ct., Ill., E.D., 1961)	25
U.S. v. Kim, 595 F.2d 755 (Dist. of Columbia Circuit, 1979)	4
U.S. v. Martel, 199 F.2d 670 (3rd Cir.)	23
U.S. v. Moreno, 649 F.2d 309 (5th Cir. 1981)	17
U.S. v. Pomponio, 528 F.2d 247 (4th Cir. 1975)	22, 23
U.S. v. Price, 722 F.2d 88 (5th Cir. 1983)	13
U.S. v. Vitiello, 363 F.2d 240 (3rd Cir. 1966)	22
U.S. v. Winstead, 708 F.2d 925 (4th Cir. 1983)	24

STATUTES

26 U.S.C. § 7203	2, 25

CONSTITUTIONAL AMENDMENTS

The Fifth (5th) Amendment right to:

A) Due Process

B) Not testify

C) Grand Jury Indictment

The Fourteenth (14th) Amendment right to due process.

The Sixth (6th) Amendment right to effective assistance of counsel and confrontation of the witnesses or testimony presented.

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

To The Honorable Chief Justice of the United States, and To The Associate Justices of the United States Supreme Court:

Petitioner, K. Janelle Blauvelt, files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth (5th) Circuit which affirmed the trial Court's decision.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. A copy of that opinion is attached as Appendix "A". A copy of the denial for En Banc Hearing is at-

tached as Appendix "B". A copy of the trial Court's judgment is attached as Appendix "C". A Copy of the Fifth (5th) Circuit's grant of a Stay of Mandate pending a decision by the Supreme Court is attached as Appendix "D".

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and order of the 5th Circuit Court of Appeals is dated and was filed and entered on the 30th day of November, 1984. Petitioner filed a Suggestion for Rehearing En Banc on the 4th day of January, 1985. On the 24th day of January, 1985, the panel members voted not to grant an En Banc Hearing.

Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is vested in the Supreme Court of the United States.

STATUTES INVOLVED

This case involves 26 U.S.C. 7203. The Petitioner was convicted of *willful* failure to file federal tax returns for three (3) years.

SUMMARY OF THE CASE

K. Janelle Blauvelt, herein called Petitioner, and Tony D. Blauvelt, herein called Husband, did not file tax returns timely for the years 1978, 1979, and 1980. (Government's Exhibit 109 admitted without objection).

Husband had gone through a tax course, and a prior Court controversy, and had difficulty understanding how to file the forms previously.

Husband had earned enough income to report (transcript page 89 through 91), Petitioner had earned income in the years 1978, (transcript page 66, lines 8 through

10, and transcript page 68, line 6), 1979, and 1980. (See transcript page 80, lines 13 through 23), and also showed proper withholding had been made by the Petitioner on her wages. (See transcript page 74, lines 7 through 16). Occasionally, Petitioner received commission checks from Husband which were endorsed over to her. Husband and Petitioner had separate checking accounts and Husband controlled all family records. (See transcript pages 67 and 88).

The Petitioner occasionally assisted Husband in his business. The Petitioner had in the past when she was single, filed returns. While married to the Husband, Petitioner had signed at least one return.

The U.S. Attorney, herein called Wallace, used or caused to be used the term Grand Jury over seventy-five (75) times during the three (3) day trial, allegedly for purposes of impeachment. No impeachment was introduced from any Grand Jury testimony or references to the Grand Jury.

K. Janelle Blauvelt filled out receivables and handled payroll. (Transcript page 125 and 127), but she did not, as Wallace argued (see transcript page 46), fill out W-2 forms. (See entire record, no evidence of same).

STATEMENT OF THE CASE

QUESTION I

Improper use of the Grand Jury Testimony

In the instant case, the Fifth (5th) Circuit has created a curious and dangerous inconsistency which threatens the constitutional value of the Fifth (5th) Amendment Grand Jury proceedings and due process clause and the Sixth (6th) Amendment rights to confrontation of witnesses, impartial jury, and assistance of counsel.

The Government is allowed to use self-serving interpretations of statements made in front of the Grand Jury to the trial jury. (See Brief infra). On the other hand, the Defendant is not allowed to repeat self-serving verbatim quotations from Grand Jury testimony. [See *U.S. v. Anderson,* 77 F.2d 258 (5th Cir. 1978)].

The Fifth (5th) Circuit is unique in its double standard of permissible evidence. The District of Columbia Circuit concurs with the refusal of the Fifth (5th) Circuit to allow the Defendant to include hearsay that does not fit in under an exception to the hearsay rule even if it is exculpatory (see *U.S. v. Kim,* 595 F.2d 755, Dist. of Columbia Cir. 1979), but *unlike* the Fifth (5th) Circuit in *U.S. v. Blauvelt,* the rule is fair and does not violate due process because it is enforced the same for the Government as it is for the Defendant. (See *Young v. U.S.* infra).

The District of Columbia Circuit's equal protection standard is clearly expressed in *Bartley v. U.S.,* 319 F.2d 717 (Dist. of Columbia Cir. 1963). In *Bartley,* the Government wanted to use hearsay to impeach their own witness. The trial Court allowed the Government to do this and the hearsay evidence was admitted. Unlike the instant case, no objection was made, and unlike the instant case, the evidence constituted impeachment. Nevertheless, the District of Columbia Circuit found the trial Court's failure to instruct the jury panel that the evidence could be used as a prior inconsistent statement to show lack of credibility of the witness and not to show the truth of the matter asserted, constituted reversible error. The Court stated Rule 52(b) authorized the Court to rule on plain error or defects involving substantial rights even if not brought to the trial Court's attention.

In the instant case, the Petitioner's only witness was "impeached" with non-contradictory hearsay, "interpreted" for the jury by the Government's attorney, as his personal representation regarding the Grand Jury testimony (infra) to be inconsistent. Objections were repeatedly made sometimes granted sometimes denied but always ignored by the prosecutor.

The District of Columbia Court ruling is in opposition to the Fifth (5th) Circuit's position. Much of the same subject matter position, although not as squarely on point, was more recently re-affirmed by the District of Columbia Appellate Court. (See *U.S. v. Gilliam*, 484 F.2d 1093, District of Columbia Cir. 1973).

In the opinion of the Petitioner, the Government was losing its case against the Petitioner. Upon the conclusion of the Co-defendant, Tony Blauvelt's (Petitioner's husband) testimony, it was obvious that there was not sufficient evidence to show any requisite knowledge or intent to support a finding of willfulness on the part of the Petitioner.

Wallace's conduct, when examined by reading the entire record, creates as he called it, a road map leading to an obvious conclusion: He used his personal unsworn characterization of the Grand Jury to destroy the presumption of innocence. In fact, he took a giant step beyond mere inadmissible hearsay. The hearsay came from his own unsworn, uncross-examined lips. It was far more effective than the self-serving Grand Jury statements the Fifth (5th) Circuit disallowed on behalf of the Defendant in *Anderson* (supra) might have been.

The new frontier Wallace forged, created a presumption of guilt. With over seventy-five (75) references

to the Grand Jury, including his own personal reflections, he let the trial jury clearly know the Petitioner and Husband were trying to defeat the just decision of the Grand Jury by hiding evidence. This brillant, but unethical attack, continued unabridged by obedience to the Court's occasional ruling against Wallace (most of the objections were sustained in his favor) on the issue of Grand Jury proceedings by ignoring the rare adverse rulings. (Examples cited infra).

In the instant case, the indictment, the charge of the Grand Jury, was read by Wallace. (See transcript page 41, line 12 through 14).

Special emphasis was put on the words "Grand Jury", but the "emphasis" was not put into the record. (See trial Court tape recording). There were no instructions given at this time that the indictment was not to be considered as evidence in this case or for any other reason. Although the Court had previously said that what the attorneys had said would not be used as evidence, this statement, the indictment, read by an attorney, was not coming from the attorneys, it was coming from the "Grand Jury".

No objection was made inasmuch as counsel for the Petitioner failed to see the beginning thrust of the U.S. Attorney's case. The word indictment was used shortly thereafter, (see transcript page 44, line 24), and again objection was not made and in all probability error at this point had not been committed, but the predicate was being laid to confuse the word indictment with conviction in the jury's collective mind. It was the intentional theory of the Government's case that since the Petitioner and her spouse has been indicted by the Grand Jury, they were probably guilty.

Examination of witnesses began on page 64 of the transcript, and ended on page 400. The term "Grand Jury" was used in excess of seventy-five (75) times in front of the trial jury, in most cases by the U.S. Attorney, but in a few occasions, once Wallace's scheme was unfolded, the attorney for the Husband in an effort to refute the obvious implications that the U.S. Attorney was selling. A substantial portion of the transcript during these pages consists of objections and discussions with the Court requesting that the Grand Jury remarks not be allowed during the trial. In fact, a discussion and dispute between the Court and counsel for the Petitioner indicates that by the end of the trial the Court felt more objections to Grand Jury references had been made than counsel for Petitioner remembered or the record reflects. (See transcript page 391, line 21 through 25, and transcript page 392, line 1 through 12).

During the one day of trial, approximately seventy-five (75) times, references to the Grand Jury were made in order to put emphasis on the Grand Jury indictment as a method of shifting the burden of proof over to the Defendant. This major portion of the thrust of the Government's case was successful. *The jury was convinced the indictment was evidence of guilt!*

On page 289 of the transcript, Wallace, began an attack in earnest based on the Grand Jury indictment using the foundation he had began laying during Voir Dire. Objection was made to the use of the Grand Jury proceedings in this trial and at this time was overruled. (See transcript page 289, line 4 through 21).

The Grand Jury is mentioned three (3) times on that page including specifically:

> "I sent you a letter advising you that the Grand Jury, Federal Grand Jury was going to be hearing evidence and considering an indictment as to you and your wife for willful failure to file income tax, did I not?"
>
> (See transcript 289, line 18 through 21).

This was the fourth (4th) time in twenty-one (21) lines that the Grand Jury had been named. Emphasis was put on "Federal Grand Jury". Why? Wallace was in effect, rather than asking questions, making a Jury argument to overcome the Petitioner's constitutional presumption of innocence.

Constant and continuous emphasis was placed on the Grand Jury through the balance of Mr. Wallace's cross-examination and some references to it during Mr. Izen's (Co-defendant's counsel) re-direct as he tried unsuccessfully to heal the prejudicial wounds created. Counsel for the Petitioner refrained from these references and objected continuously to the use of them, by Izen or Wallace. Whether utilized by the U.S. Attorney, as they were generally used, or the Husband's counsel in his futile attempt to restore his client's constitutional presumption of innocence, Petitioner felt they were harmful and objected. (See transcript page 290, line 15 through 17, and transcript page 291).

Mr. Wallace's explanation to the Court was:

> "Okay. I am not planning on doing any of those things, getting into the Grand Jury testimony. My purpose is to show prior inconsistent statements under Rule 801, I think under Rules of Evidence—".

(See transcript page 292, line 4 through 7), and Court overruling the objection of Petitioner, (transcript 292, line 12 through 14).

Although his expressed reason as an officer of the Court, was for impeachment, nowhere throughout the numerous and repetitious times the Grand Jury Indictment and Grand Jury testimony and Grand Jury statements and statements to the Grand Jury were referred to or paraphrased by the U.S. Attorney was any prior inconsistent statement found or used. Wallace knew he was wrong but was driven to continue what became a successful case theory as long as he could get away with it.

A continuous and constant scheme to imply, with the use of the Grand Jury testimony, guilt was applied several more times on that same page and throughout the cross-examination. Four (4) more occasions (see transcript page 304), objection made again and overruled again. (See transcript, page 305). Constant, continuous additional references to the Grand Jury were made. (See transcript page 306, line 20 through 22). U.S. Attorney Wallace:

> "And even though you were advised you shouldn't say anything that should incriminate you, you elected to testify before a Federal Grand Jury, did you not?"

(See transcript page 307, line 5 through 9), Wallace has with this impermissible Grand Jury question implied that Mr. Blauvelt told the Grand Jury things that incriminated himself, which of course led the jury to think he was found guilty by the Grand Jury because he was guilty, that Wallace had been "fair" to him trying to protect him from himself and that his testimony on behalf of his wife was not credible.

Wallace continuing on cross-examination of Husband asked:

"Even though you had been advised or counseled or taught not to say anything that might be used against you, you elected to appear and testify before a Federal Grand Jury, did you not?

A: Yes, I did appear before the Grand Jury."

This is the closest Wallace ever got in his alleged effort to show he was trying to impeach the witness. It falls far short of any inconsistent prior statement but it insinuates guilt and poor judgment.

In his effort to thrust "Grand Jury" down the trial Jury's collective throat, Mr. Wallace then went far beyond the boundaries of a previous Court Order instructing him not to bring up a letter which had been given to the Grand Jury except for purposes of impeachment and without previously bringing the letter before the bench out of the jury's presence as he had been instructed. (The letter was not placed into evidence).

"Mr. Minns: It is quite clear that the Court's Order should have been obeyed on this.

Mr. Wallace: I agree it is not inconsistent. But as long as I am not asking something from that letter I am not impeaching him. Only I want—all I ask —.

Mr. Minns: The point—.

Mr. Wallace: The first I am going to show him the letter, to let him look at it. Then I will ask him some questions.

Mr. Minns: Those questions are not impeachment.

The Court: No, they are not impeachment. (See transcript page 342).

The Court instructed Mr. Wallace not to bring forth the letter that had been given to the Grand Jury again

since it had clearly not been used for purposes of impeachment. (See transcript page 343, line 13 through 17). Unfortunately, the conduct had continued for a long period of time. Abandoning the letter as a vehicle to discuss the Grand Jury, the U.S. Attorney, shortly thereafter, resumed his Grand Jury line of questioning. (See transcript page 348, line 23 through 25). This was the fifteenth (15th) time that reference was made by Mr. Wallace *in front of the trial Jury*, concerning the Grand Jury. Instructions had been given that these references could be used only for impeachment. The Court had now clearly indicated to Wallace the references had not been used for impeachment prior to this time, but the U.S. Attorney ignored the Court and continued. (See transcript, page 349, page 350, and 351). On page 351, Mr. Izen objected and the objection was overruled. It would have been redundant for Petitioner's counsel to object. (See transcript page 352).

At this time, taken off-guard by the rapid fire succession of improper references to the Grand Jury for what Petitioner's counsel counts to be twenty-five (25) times, counsel for the Husband, Co-defendant, made a Motion to Dismiss the indictment in front of the jury. This was prejudicial to the interest of the Petitioner and therefore, counsel for Petitioner objected to that specific objection being made in front of the jury. (See transcript page 353). *THE EFFECT ON THE JURY WAS TO WITNESS THE JUDGE, AFTER HEARING EVIDENCE, SUSTAIN THE INDICTMENT.* The lay jury reasonably concluded that the Judge was commenting on the validity of the indictment and therefore the guilt of the Defendants.

In light of this and all of the other usages of Grand Jury references, at this time counsel for the Petitioner felt error could not be cured. Counsel for the Petitioner made

a Motion for Mistrail and said Motion was denied. (See transcript, page 353, line 20 through 25).

Immediately thereafter, counsel for Petitioner requested, (see transcript page 354, line 1 through 3).

> "Mr. Minns: I would also like to request, Your Honor, that this Grand Jury stuff stop. It is so prejudicial, half of his case is based on Grand Jury."

and requested that the impossible burden that was being put on the Petitioner be stopped. The Court denied this Motion. (See transcript, page 354, line 1 through 10).

Immediately upon hearing the Court's denial of this Motion, Mr. Wallace began again and (see transcript, page 354, line 14 through 25), making reference to the Grand Jury.

The reason given was again to show inconsistent statements and yet no inconsistent statements were shown. Mr. Wallace knew in advance that there were no inconsistent statements. He had heard the testimony and read the Grand Jury minutes and been present in the Grand Jury room. His modus operandi becomes increasingly clear. From a reading of the transcript through to page 354, (the 28th reference to the Grand Jury): To imply that the two (2) Defendants had already been tried before the Grand Jury and by implication therefore the burden should shift to the Petitioner to prove her innocence.

There was no stopping Wallace. In order to protect the Petitioner for the record from the constant and continuous Grand Jury references, without unduly delaying trial or further prejudicing the jury by allowing Wallace to imply Defendants were trying to hide something by objecting so often to Grand Jury testimony, a request for a running objection was made. [(See transcript, page

355), for running objection and four (4) more references to the Grand Jury.]

Although there were no inconsistent statements made or brought up, Wallace continued by asking Mr. Blauvelt, [see transcript, page 356, line 18 through 21, for the statement and for two (2) other references to Grand Jury].

> "Well, would it be safe—would you agree with me having read that Grand Jury testimony that the testimony and the information that you gave that Grand Jury was totally different from what you have given to these folks?"

What has Mr. Wallace accomplished at this point? He has told the jury that he has read the Grand Jury testimony and that Mr. Blauvelt lied to the Grand Jury. One can draw no other logical inference from his statement. Petitioner's running objection was overruled. In other words, the Grand Jury, indicted or as the implication was successfully made, "convicted", the suspect Mr. Blauvelt (whose assumed guilt covered the Petitioner too) and therefore, so should this jury which had now been placed, not in the role of the trier of facts, but in an Appellate position attempting to review whether or not Mr. Blauvelt's and the Petitioner's convictions by the Grand Jury should be over-turned. The conclusion the Jury had to make was that either Mr. Blauvelt was dishonest, or the United States Government (through the U.S. Attorney) was dishonest.

In *U.S. v. Price*, 722 F.2d 88 (5th Cir. 1983), the Court refused to allow the Defendant's conviction to stand where testimony computations evoked from an Internal Revenue Service Agent came from Government witnesses the Defendant did not have an opportunity to examine. While the instant case is different, the principle

is similar. Should the prosecutor be allowed to use his own statements, when he cannot be cross-examined, and in effect utilize the entire Grand Jury proceedings to his advantage when Petitioner's counsel was not present during the proceedings?

In *U.S. v. Escamilla,* 666 F.2d 126 (5th Cir. 1982), a mistrial was given to the Co-defendant because the other Co-defendant's non-responsive answer was so incriminating. In the instant case, any answer would have been incriminating. The prejudicial question asked the Co-defendant was incriminating.

No Grand Jury testimony is in the record which would indicate that Mr. Blauvelt had been dishonest, nevertheless, counsel for the Petitioner believes that most persons would choose to favor the United States Government and thus, the burden of proof was completely shifted over to the Petitioner and her Husband to prove their innocence.

We are faced with an incredible abuse of the Government's power and authority by the prosecutor.

An attempt was made through the constant and continuous references to link the Petitioner with the supposed guilt of the Husband. (See transcript page 459, lines 21 through 24).

A Motion for Severance had been made and denied prior to the beginning of trial. It was made on the basis of Mr. Blauvelt's letter sent to the Grand Jury and the feeling that this could be used to cause prejudice against the Petitioner. However, it could not be anticipated that the need for severance would be necessary because of the prosecutor's improper continuous references to the Grand Jury.

Continuing on his Grand Jury vendetta, the prosecutor stated:

"Well, did you not want to get in here today what you got into with the Grand Jury?"

Objection was made by counsel for Petitioner. (See transcript, page 357). The Court overruled the objection.

By Mr. Wallace. (See transcript page 358).

"Why don't you try to summarize for the ladies and gentlemen of the jury, basically what you told that Grand Jury back in May?" (Later, he did basically summarize).

Objection was made that these were not prior inconsistent statements and Mr. Wallace again attempted to show the Court he was on a just impeachment quest and for the second time, the Court ruled that it was not impeachment, (see transcript page 359, line 12 through 14, addendum page 75):

". . . It is not inconsistent of what he told the Grand Jury, he has said he has not told today what he told to the Grand Jury."

At this time, after thirty-seven (37) direct references had been made by the Government to the Grand Jury, the Court ruled:

"I am ruling, I am not going to let the Government go on and ask about it, has already asked him individually and put through these defenses. . . ." (Unfortunately, the Court also later ruled that "Counsel for both sides can argue it to the jury.")

(See transcript page 360, line 4 through 10).

In an effort to refute the improper references to the Grand Jury, Mr. Izen made reference to the Grand Jury, in the defense of Mr. Blauvelt. (See transcript page 362, line 3 through 5). Counsel for Petitioner objected and requested a running objection to Co-defendant's use of

Grand Jury references on redirect (see transcript page 362, line 10 through 13).

> "Your Honor, I would just like a running objection to any more questions even though he may be trying to rehabilitate, I don't know, I have to have a running objection about anything about the Grand Jury, I request that."

The Court allowed the running objection.

Numerous references were made to the Grand Jury on redirect. (See transcript page 362, 363, 365, 368, 369, 370, 371). On page 371, counsel for the Petitioner told the Court, line 20:

> "Mr. Minns: I am just scared to death of the Grand Jury thing, Your Honor, I know you are giving me a running objection, but again, I need to object to that and I make certain I didn't waive anything.
>
> The Court: You haven't waived anything, any objection, any time Grand Jury is mentioned you have an objection to it. The door has been opened to go into what the statements say of the Grand Jury, it's in the record now." Page 372, line 3.

The Court agreed to give instructions on the charge, but this was insufficient to cure the error. [Continued references to Grand Jury (see transcript page 373, 374, 375).] Counsel for the Petitioner did not make references and did not try to rehabilitate the witness on the Grand Jury issue feeling that it was not possible and would compound the damages.

On re-cross, over objection by Petitioner that continued Grand Jury questions were, in addition to being prejudicial and improper for reasons discussed (supra), Petitioner objected that the renewed Grand Jury disclosures and Grand Jury arguments by Mr. Wallace did not con-

stitute rebuttal. The Court overruled the objection. (See transcript page 376).

Continuing on re-cross, Mr. Wallace made numerous additional references to the Grand Jury. (See transcript page 377, 378, 380, 381, 382, 384, 385, 386, 398). Said references to Grand Jury were made during this period an additional twenty-five (25) times. Objection was made (see transcript page 388), again overruled.

The Court occasionally gave instructions that this information was not to be used against the Petitioner, but, after so much repetition, it became impossible to distinguish between the two (2). The Government's clear intent was to use the Grand Jury to help convict not only the Husband but the Petitioner as well. (See transcript page 289).

Counsel for the Government in closing argument, merged the two (2) Defendants together (see transcript page 459, lines 21 through 24), and based on his past "impeachment" of the Husband through improper non-inconsistent statements, (but with Mr. Wallace's implications of inconsistent statements), which did not exist, he succeeded in convicting the Petitioner also. The entire trial became a circus appealing the ruling of the Grand Jury as opposed to a fresh new hearing of the facts. Certain evidence has to be weighed and considered whether or not it is probative and whether or not that probative value exceeds the harmful value. (See *U.S. v. Moreno*, 649 F.2d 309, 5th Cir. 1981 case. See Federal evidence rule 403).

In this situation, the references to Grand Jury, while extremely prejudicial, had no probative value whatsoever, the Court's instructions after so many times could not reform the error. [(See *Commonwealth v. Peay*, 85 A.2d

425, S.Ct. of Penn. 1951) concurring opinion.] The clear purpose of these statements as to the Petitioner, was to indicate that the Co-defendant, her husband, had made certain admissions before the Grand Jury or certain statements which incriminated him before the Grand Jury and therefore, she was also guilty. This is improper use of Grand Jury proceedings against Mrs. Blauvelt. (See *Bruton* infra).

Even though the Court instructed the Jury not to regard these statements against the Petitioner, after the substantial and overwhelming amount of the trial, was based on them, including admissions by the Husband, this was impossible. These admissions constitute prejudicial error, even if the Trial Court gave clear concise and understanding instructions that they couldn't be used against the Co-defendant. (See *Bruton v. United States,* 88 S.Ct. 1620, 1968).

In the Texas State Court, the statements that the Grand Jury has found someone to be guilty have been found to be reversible error. (See *Alford v. State,* 258 S.W.2d 817, Court of Crim. App. of Tx. 1953). There seems to be a shortage of Federal cases involving this specific type of misconduct. Perhaps it is so clearly error as to be beneath the efforts of most Federal prosecutors. In the instant case, the statement was not specifically made that the Petitioner was guilty, but the implication was just as bad. The implication was that the Petitioner's Husband was guilty, that he had lied to the Grand Jury, and therefore his credibility, upon which the defense of the Petitioner was based, was severely damaged. An interesting Pennsylvania case, (*Commonwealth v. Peay,* infra), indicated that; charges in criminal prosecution may not be established through innuendo, inference, or unsupported accusations. This is exactly what was done in the instant

case and is a position not inconsistent with this Court's prior rulings.

The only Federal case on abuse of Grand Jury statements on point appears in *Young* (infra).

In *Young v. United States,* (see 214 F.2d 232, District of Columbia Cir. 1954), the Court found regarding cross-examination of a key defense witness:

> "In its examination of him the Government was permitted to read in open court considerable testimony he had given before the grand jury. It is urged by the accused that this was prejudicial error. We agree and now state in some detail the circumstances which lead to this conclusion".

A key defense witness had previously testified before the Grand Jury. His Grand Jury testimony was used for the purpose of discrediting him. The Government asked many of the statements of the witness allegedly "to refresh the witness' recollection". The Government apparently wanted the repetition of statements made in front of the Grand Jury.

Ultimately, under trial Court approval:

> "Whereupon Government counsel was permitted to read aloud, in the presence of the jury, from the minutes of the Grand Jury proceedings, pausing intermittently as indicated to ask the witness if he were not so questioned and if he did not so answer, as follows. . . ." (See *Young*).

This error is strikingly similar to Mr. Wallace's statement (see transcript 356), and very harmful, but actually not quite as harmful as Wallace's. Wallace in his leading question actually "testified" to the Jury implying that the Petitioner's Husband had lied or been "inconsistent".

> "So far as the jury was concerned the grand jury minutes read in open court was apparently 'testimony in this case'." (See *Young*)

According to the Court:

> *"The witness adherred to his testimony. Unsatisfied, Government counsel was permitted to read aloud much more of Lawrenz's grand jury testimony. This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had been no cross-examination and defendant was not confronted with the witnesses against him."*

See U.S. Constitution Amendment VI. (See *Young*).

This is exactly what happened in the instant case. Testimony was put before the trial jury which K. Janelle Blauvelt had not previously had an opportunity to cross-examine. In the instant case, the testimony was even more foreceful than it was in *Young v. United States,* because the testimony did not come from a mere defense witness but came from the Co-defendant, her Husband. The only difference is that in *Young,* the U.S. Attorney *may have been trying* to refresh the witness' memory as claimed, (although the District of Columbia Circuit was not convinced). In the instant case, the record clearly shows that Wallace was not trying to show an inconsistency. *He knew there was no inconsistency, and one occasion admitted as much (supra). The record shows no inconsistency.*

Finally, the strength of the testimony was made even more damaging than in *Young v. United States,* because in *Young* the U.S. Attorney did not have the gall to testify himself using leading questions. In the instant case, there are numerous examples cited in Petitioner's brief (supra and infra) in which Wallace actually "testified" with his leading questions regarding the substance of the grand jury hearing.

The Court in *Young* also explained that:

> "The fact that the witness was on the stand and subject to cross-examination does not supply the omission of confrontation and cross-examination at the time the grand jury testimony itself, later read to the trial jury, was given."
>
> " . . . Lawrenz was a principal witness in support of the Government's position that the accused represented Peerless in connection with a loan application before the RFC. His testimony was significant and was so treated at the trial."
>
> " . . . On this phase of the case, a major one in terms of defendant's guilt or innoncence, Lawrenz's testimony was important. We cannot say the same verdict would in any event have been reached without it, or that his grand jury testimony which the trial jury heard did not influence their verdict".

In *Young,* the only Federal case which Appellant has found, which is directly on point in several areas, there were no dissenting opinions.

The Fifth (5th) Circuit apparently has one standard of reviewing evidence for the Government and another harsher standard for the Defendant. The District of Columbia Circuit following more than a decade of repeated fair standards, (see *Young, Bartley* and *Gilliam,* supra), runs contrary to *U.S. v. Blauvelt.*

The Petitioner had no way to confront this damaging Grand Jury hearsay and interpretation of hearsay. She had no notice of the Grand Jury hearing. If she had, she would not have been allowed to have counsel inside the Grand Jury room, let alone, cross-examine anyone.

If the use of Grand Jury testimony alone, were the cause of error, it would justify reversal, but Wallace's "new frontier" which is rejected by the District of Colum-

bia Circuit's history (see *Young, Bartley* and *Gilliam,* supra), would allow a new unprecedented voice to echo his or her personal hearsay—the prosecuting attorney. Wallace, of course, never took the stand. Petitioner was not able to confront "his" version of the Grand Jury proceedings.

The Grand Jury system was intended as a constitutional protection and not a prosecutional weapon.

QUESTION II

Pre-requisite Knowledge and Due Process Fifth (5th) and Fourteenth (14th) Amendments

The motive of the taxpayer is important on the issue of good faith as a defense against the finding of willfulness. (See *U.S. v. Pomponio,* 528 F.2d 247, 4th Cir. 1975), and carelessness alone cannot be used to sustain a conviction. (See *U.S. v. Vitiello,* 363 F.2d 240, 3rd Cir. 1966).

The greatest evidence of knowledge on the part of the Petitioner was simply her association with the Co-defendant (see supra). Severance was denied the Petitioner and so she was forced to bear this stigma of association. It became particularly difficult when counsel for the Co-defendant in closing argument castigated the special agent for the I.R.S. about not taking the stand. (See transcript page 462). Unfortunately for the Petitioner, she had not taken the stand and thus her Fifth (5th) Amendment, right to silence, was negated destroying her Sixth (6th) Amendment, right to an impartial jury. (See *Collins v. U.S.,* 383 F.2d 296, 10th Cir. 1967). Objection at this time would have caused even greater damage by focusing a spot light on the Petitioner concerning her decision not to testify.

In determining the minimum standard of acceptable evidence, (See *U.S. v. Conforte,* 624 F.2d 869, 9th Cir. 1980), the Appellate Court allowed the taxpayer's wife to be convicted based on her taking an active role in supervising employees at a house of prostitution, receipt of correspondence from a tax attorney directly to her, and evidence that she had filed tax returns for other business operations (among other evidence). *In light of that, the Petitioner would like this Court to examine the differences between the Conforte case and the instant case.* Both cases, *Conforte* and the instant case, had spousal convictions.

"Willfulness requires a showing of specific wrongful intent to avoid a known legal duty". (See *U.S. v. Pomponio,* 528 F.2d 247, 4th Cir. 1975). "It is the state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to avoid". (See *U.S. v. Martel,* 199 F.2d 670, 3rd Cir.). In the *Conforte* case, Sally Conforte had filed all the tax returns for the Restaurant which she and Joseph Conforte were the proprietors. "There were, moreover, numerous other acts shown from which it is proper to infer a willful plan to defraud the Government." (See *U.S. v. Conforte,* 624 F.2d 869, 9th Cir. 1980). The Confortes' prostitution company, Mustang Ranch, handled all its expenses in cash. Mrs. Conforte was an equal working partner who, personally filed the tax records frequently. (In fact, while her Husband was clearly involved in the business operations of the Ranch, he may have been the subservient partner, in contrast to the instant case in which the Petitioner clearly had no authority or control in operations). The license fee for the Brothel was paid in cash. Employees were told by the Confortes not to report their wages. This was a regular practice. Records

were intentionally burned. *Both,* Mr. & Mrs. Conforte were told by the Government to start reporting taxes. They had both been represented by Clyde Maxwell, an experienced attorney in tax matters.

The evidence against Mrs. Conforte on examination, which appears to be a leading case demonstrating the minimally acceptable standard for evidence of willfulness allowed, is significantly different from that of Mrs. Blauvelt.

Mrs. Conforte played an active role in supervising the business. Mrs. Blauvelt only helped her Husband from time to time. Mrs. Conforte actually filed the returns for the business. Although Wallace stated in his opening argument that Mrs. Blauvelt had tax expertise, (see transcript page 126 and 127), and gave inaccurate legal "advice" to the jury over objection that the Petitioner could have filed an inaccurate return and been better off, (see transcript page 450, lines 10 through 18), there was no evidence that she had ever prepared a return during the entire time of her marriage to Mr. Blauvelt. In fact, the uncontroverted testimony was that Mr. Blauvelt put the return in front of her and she signed it as she signed papers for their home and all other papers which he put in front of her. (See transcript page 288). The Summons was addressed only to him (see transcript page 286). She was kept in the dark. (See transcript page 287).

If the evidence does not show knowledge concerning the illegal actions beyond a reasonable doubt, the evidence will not support a conviction. (See *Edwards v. U.S.,* 321 F.2d 324, 5th Cir. 1963). The Defendant must be aware of criminal intent on the part of principals (in the instant case her Co-defendant). (See *U.S. v. Winstead,* 708 F.2d 925, 4th Cir. 1983).

Our Federal legislature was obviously not content with the civil liability of the innocent spouse. (See 26 U.S.C. § 7203). The spouse was relieved of civil liability in certain cases.

The community property law in Texas clearly gives the Petitioner ownership of 1/2 of the income of her spouse's earnings and quite possibly in much the same way as a partnership, she may be held civilly liable for the debt that her Husband does not pay the United States Government. (Except under the legislative change which under some circumstances frees her from this obligation). However, under no circumstances, should she be held criminally liable because, while in many instances, civil liability can occur when a duty arises due to a partnership, or a marriage, or other civil action, or even the active child who causes damages historically may cause his parents to suffer liability for civil wrongs not within their power; but never for criminal wrongs which they did not have the intent to commit or the ability to avoid committing. The question of willfulness is very important in the instant case on willful failure to file. In order to prove willfulness, the Government also needed to prove ability. In *U.S. v. Goodman*, 190 F.Supp. 847, U.S. Dist. Ct. Ill., E.D. 1961, inability to pay clearly established the right to an acquittal on charges of willful failure to pay.

Wtihout it, there is no distinction between civil and criminal guilt. A criminally innocent spouse could be held liable for the acts of the guilty spouse. Congress has addressed what is a substantial problem for the innocent spouses unable to comply with the civil liability assessed on them by the Government. No statutory criminal defense is necessary as was mandated by some civil cases, because an innocent spouse cannot be guilty of willful failure to file.

The law in Texas (see Section 5.22 of the family code), is:

> "(a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:
>
> (1) personal earnings;
>
> (2) revenue from separate property;
>
> (3) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.
>
> (b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.
>
> (c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement."

A judgment for acquittal should have been entered inasmuch as K. Janelle Blauvelt did not have the capability of complying with the statute. Everything was in the hands and control legally and actually of the Husband. The two (2) had separate accounts, the Husband was the complete boss, and Petitioner acknowledged her position in the family. (See transcript pages, 67, 75, 77, 78, 82, 83, 86, 88). The evidence that the Government offered to show that she knew she had to file returns,

was that she had in fact signed her return previously. The testimony on that was that her husband shoved it in front of her and had her sign it. (See transcript page 361).

The law places Mrs. Blauvelt, the Petitioner, in a strange position. She is required to file a return with information she does not have. If she files this with information she does not have, she could be liable for tax evasion, a more serious offense than the one she is appealing from. She knew that she collected some money from her Husband, so if she had filed the return, with the limited information that she had, she would have done so, knowing that it was not correct (as the Government suggested she should do, see transcript page 458).

Is this what she was required to do? Is she required to file a return like some tax protestors saying either, "I do not know how much money I made", or, "I refuse to answer this question under Fifth (5th) Amendment protection". This would clearly be improper.

With the first answer, she would cause an enormous amount of problems for her Husband and herself and do the Government no favor and in the second situation, she would be found guilty of failure to file anyway.

What was the Petitioner to do? The question is difficult to answer. In fact, the Government put its own tax expert on the stand. He was allowed to sit through the entire trial over objection, in order to summarize the events. He is a teacher. When posed with hypotheticals, identical or nearly identical, similar to the Petitioner's, he could not give an answer which would have prevented the Petitioner from being prosecuted for this crime. (See transcript page 185, 186).

Petitioner objected to the "expert's" testimony on community income without giving an explanation of "control" pursuant to 5.22 (see transcript page 189 and 190). The Court refused to rule and let the Government proceed. (See transcript page 190, lines 3 and 4). Finally, the Court overruled Petitioner. (See transcript page 191).

The Court then asked if the taxpayer had an option (see transcript page 193, lines 6 through 13) and the answer of the expert was yes. The option was to report one-half (1/2) of all income and file a separate return. Unfortunately, without the Husband's cooperation, this was impossible.

On cross-examination, the expert said if the Petitioner filed without her Husband's full income she would be in error (see transcript page 210) and she was responsible (see transcript page 211). He could not, however, help her or tell her what to do (see transcript page 211, lines 3 through 16). In fact, in his words:

". . . you're going to have a real problem." She did.

The defense counsel had posed the question that if his wife left and didn't tell him what her income was, what would he do. [In the instant case, the Spouse (Husband) had not left but he had not provided any assistance or access to the records].

Further cross-examination went into the specific case, (see transcript page 215), still without an answer.

Was the Petitioner expected to go out, look up an I.R.S. Agent and tell him or her that she was in fear for her criminal safety because her Husband had not filed a tax return? Is that the type of conduct our Government wants to encourage? Petitioner does not believe so. Federal case law does not compel a spouse to testify against his/her spouse for criminal prosecution.

The uncontroverted evidence was that she was under the impression that he was handling all of their affairs. The uncontroverted evidence is that he tried to shield her from this (see transcript page 287), he even hired the Petitioner's attorney for her (see transcript page 263, and 264).

The uncontroverted evidence is that no one can advise her what she should do. (See transcript pages 210, 211, 215). She just has to go to jail.

The lack of clarity in our current tax code is a matter this Court can take judicial notice of. In the last election, both of our two (2) national candidates for Vice-President were the subject of harassment and personal inquiry because of their tax errors (neither was criminally prosecuted). If that "little" book (the I.R.S. code) and its legion of interpretive cases and amendments and regulations could sit up and talk, it would cry: "Nobody understands me."

The Petitioner is not suggesting that the tax code is unconstitutionally vague (although clearer statutes have been found to be unconstitutionally vague) but that evidence of the ability to perform must be a pre-requisite to being held criminally liable to perform. To have the intent not to file, you must be apprised of the obligation, you must know you didn't file, and you must be able to file and consciously refuse to do so.

REASONS FOR ALLOWANCE OF THE WRIT

The District of Columbia Circuit and the Fifth (5th) Circuit now have two (2) different rules with regard to prejudicial hearsay admitted without falling under any exception or proper instructions. The Fifth (5th) Circuit

disallows it for the Defendant but allows it for the Government. The District of Columbia Circuit does not permit Government or Defendant to utilize it. The Supreme Court should review this controversy and support the District of Columbia Circuit ruling.

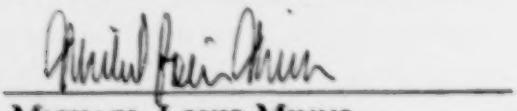
If Congress made no other intention obvious in its flood of tax legislation, it did succeed in clearly mandating that failure to file must be supported by "willful knowing" conduct. The tax cases examined herein and found by Petitioner all show knowledge of the duty and overt acts to avoid the duty. When a spouse is convicted, the spouse is convicted because he/she is acting in harmony jointly to avoid tax regulations. In the instant case, this is not true.

CONCLUSION

For all of these reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL LOUIS MINNS, P.L.C.

By: 

MICHAEL LOUIS MINNS
20214 Braidwood, Suite 100
Katy, Texas 77450
(713) 578-3588

Attorney for Petitioner

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TONY D. BLAUVELT and K. JANELLE BLAUVELT,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

(November 30, 1984)

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:*

Tony D. Blauvelt and his wife, K. Janelle Blauvelt, were convicted after a trial by jury, on six counts of an indictment charging each of them with failing to file income tax returns in violation of 26 U.S.C. § 7203. They

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appeal their conviction, asserting that the record contains insufficient evidence to sustain a determination that they willfully failed to file income tax returns for the years 1978, 1979 and 1980; that their conviction should be reversed because of judicial bias and prosecutorial misconduct; and that a new trial is required on the grounds of jury misconduct. Mrs. Blauvelt separately argues that the terms of the probation are unduly harsh since compliance with them is impossible. We reject all of the appellants contentions, and affirm the convictions of both defendants.

I.

Appellants Tony D. Blauvelt (Tony) and K. Janelle Blauvelt (Janelle) were married and living together during all three tax years involved in this case. Tony was employed as a sales representative for a company that manufactured wedding albums. He was well educated in the professional and business world, holding a college degree in engineering, as well as a real estate broker's license and an employment agency license. Additionally, Tony had taken a course on individual preparation of federal income tax returns. He had prepared his 1975 and 1976 income tax returns. Janelle was employed by a construction company as a secretary. Her duties included some basic bookkeeping, such as accounts receivables and accounts payable. Janelle also prepared the payroll checks for the company, deducting F.I.C.A. and federal withholding tax from employees' checks. Janelle had attended college, although she did not have a degree. The government introduced evidence that indicated that Tony's and Janelle's combined gross income totalled: for the year 1978, $70,664.96; for the year 1979, $101,722.-72; and for the year 1980, $119,654.79. In accordance

with the community property laws of the State of Texas, each spouse is required to report as taxable income one-half of the earnings of the other spouse. Therefore, whether separate or joint returns were filed, both Tony and Janelle had sufficient income to require each of them to file a federal individual income tax return.

II.

The essential elements of a violation of 26 U.S.C. § 7203 are that a taxpayer have sufficient income to require the filing of an income tax return and that he *willfully* fail to do so. This court has defined "willfully" in connection with this statute as a voluntary, intentional violation of a legal duty. *United States v. McCarty*, 665 F.2d 596 (5th Cir. 1982); *United States v. Wilson*, 550 F.2d 259 (5th Cir. 1977). The appellants' first argument on appeal is that the record contains insufficient evidence to establish that they willfully failed to file their federal income tax returns.

Tony argues that the only evidence introduced against him was circumstantial, and that this evidence is insufficient to establish the requisite intent element under the statute. He argues that the evidence merely establishes that he had sufficient income to file a return for the years 1978, 1979 and 1980, that he did not file a return for those years, and that he had previously filed income tax returns, but that it does not prove that he had the specific intent to violate the statute. Tony also claims that he did not file his return because it was so complex that he could not correctly complete it and he believed that if he filed an erroneous return he would commit a felony.

The jury rejected Tony's arguments and we do also. We find that the record contains sufficient evidence to

support the jury's finding that he willfuly failed to file his federal income tax returns. Tony was well educated, had extensive experience in the business world, was aware of the graduated tax system, and had previously prepared and filed his income tax returns. He had also taken a course to assist in the preparation of income tax returns. The jury could have easily and quickly inferred from this evidence that Tony voluntarily and intentionally violated a known legal duty.

Although the evidence against Janelle is not as overwhelming, we find that the record contains sufficient evidence to support the jury's finding of guilt. Janelle was not an uneducated woman; she had business experience, and had previously filed individual income tax returns. She worked as a bookkeeper and her duties included preparing payroll checks. Janelle did not testify at trial, but according to her husband's testimony, she was not provided with any information regarding his earnings. Under Texas' community property law, Janelle is required to report one-half of Tony's earnings as her taxable income.

Janelle's lack of access to the financial data, even if the jury believed it, does not compel an acquittal. The evidence shows no effort to obtain the information from her husband, or even a request of him for the information over a three-year period. She sought no advice from any source as to how, under these circumstances, a partial or incomplete tax return could be filed. Rather, she simply did not file any return during 1978, 1979 and 1980. The jury could have concluded that Janelle's total lack of effort to file any tax returns over a three-year period, considering her background and knowledge, constituted a voluntary and intentional violation of a legal duty. The record therefore supports the jury's finding that Janelle willfully failed to file her federal income tax return.

The appellants next argue that the decision of the district court should be reversed because of judicial bias and prosecutorial misconduct. The appellants argue that the trial judge gave the appearance of supporting the government's position to their prejudice, and allowed the prosecution to "brow beat" the witnesses. "An appellate court should be slow to reverse a case for the alleged misconduct of the trial court unless it appears that the conduct complained of was intended or calculated to disparage [a party] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits." *La Barge Water Well Supply Co. v. United States,* 325 F.2d 798 (8th Cir. 1963); *White v. Chicago, Burlington and Quincy Railroad,* 417 F.2d 941 (8th Cir. 1969). After reviewing the record, we are unconvinced that the trial court was biased, or that the appellants suffered any injury from the conduct of the trial court.

The appellants claim the prosecutorial misconduct occurred because of the continual reference, especially in the cross-examination of Tony, to the grand jury proceedings. Even if, as the Blauvelts argue, the prosecutor misused the grand jury testimony of Tony, our review of the record convinces us, given the evidence of guilt, that the persistent use of the grand jury testimony did not affect the appellant's substantial rights. Because the prejudicial effect, if any, of the cross-examination was slight in relation to the overwhelming evidence of guilt, any impropriety was harmless beyond a reasonable doubt. *United States v. Willis,* 599 F.2d 684 (5th Cir. 1979).

The Blauvelts' third argument is that the trial court should have granted a new trial because of jury misconduct. The evidence of the alleged misconduct is that when Tony contacted the jury foreman without authorization, the foreman stated that Tony and Janelle were convicted

because they had sufficient income, yet failed to file an income tax return. The Blauvelts argue that this statement indicated that the jury failed to consider whether they had the specific intent not to file the return. Once again, we reject appellants argument. At the hearing on the appellants' motion for a new trial on this issue, the court questioned every juror whom the appellants subpoenaed to the hearing as to whether they followed the court's instructions. Each juror responded affirmatively. We find that the jurors' response to these questions adequately proves that the jury considered the court's instruction, and that any further inquiry into the thought processes of the jurors would be merely harassment under the facts of this case.

Finally, Janelle argues that the term of her probation which requires her to settle all tax claims with the Internal Revenue Service is not a proper condition. We disagree. It is clear that under 18 U.S.C. § 3651, the district court has an exceptional degree of flexibility in which to enact reasonable conditions upon probation. *Burns v. United States,* 287 U.S. 216, 53 S.Ct. 154 (1932). Such conditions are reviewable only upon an abuse of discretion. *United States v. McCleod,* 608 F.2d 1076 (5th Cir. 1979). In reviewing the record, we find no abuse in conditioning probation upon settling all tax claims with the Internal Revenue Service. *See United States v. Merritt,* 639 F.2d 254 (5th Cir. 1981).

We have also considered the appellants' remaining assertions of error, but find that these contentions lack merit. Our review of the record indicates that there is sufficient evidence to sustain the convictions, and that there has been no error requiring a new trial. Accordingly, the district court is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TONY D. BLAUVELT and
K. JANELLE BLAUVELT,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion 11/30/84, 5 Cir., 198__, ____F.2d____)

(January 24, 1985)

Before GEE, WILLIAMS, and JOLLY, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY
United States Circuit Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DOCKET NO. CR4-83-97

UNITED STATES OF AMERICA

v.

K. JANELLE BLAUVELT

(Filed January 27, 1984)

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, January 27, 1984, with counsel, Michael Louis Minns (Retd.), pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of Failure to File Tax Return, in violation of Title 26 USC 7203.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty (30) days to be served at the Volunteers of America, Halfway House, Fort Worth, Texas, on Count

2, and 30 days to be served at the Volunteers of America, Halfway House, Fort Worth, Texas, on Count 4. Said sentences shall run concurrently.

IT IS ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and assessed a fine of Fifteen Hundred Dollars ($1,500.00) on Count 6, execution of the sentence of imprisonment only is suspended and defendant placed on probation for a period of four (4) years. Sentence of imprisonment hereby imposed in Count 6 is to run consecutively to the sentences imposed in Counts 2 and 4. A Special condition of probation is that defendant shall settle all tax claims with Internal Revenue Service.

Defendant shall report to the U.S. Marshal's Office, Fort Worth, Texas, on February 16, 1984 at 2:00 p.m. to commence serving said sentence.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ ELDON B. MAHON
Eldon B. Mahon
U. S. District Judge

Date: January 27, 1984.

Office-Supreme Court, U.S.
FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1332 and 84-1352

In the Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

TONY D. BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ALAN HECHTKOPF
FRANCIS M. ALLEGRA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

Both petitions present the following question:

1. Whether the government improperly used petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial.

The petition in No. 84-1332 presents the following additional question:

2. Whether the evidence is sufficient to support petitioner's conviction for wilfully failing to file a federal income tax return, in violation of 26 U.S.C. 7203.

The petition in No. 84-1352 presents the following additional question:

3. Whether the grand jury was properly instructed regarding the element of wilfulness for the offense of wilfully failing to file an income tax return, 26 U.S.C. 7203.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Anderson v. *Charles*, 447 U.S. 404 6

Anderson v. *United States*, 417 U.S. 211 6

Berenyi v. *Immigration Director*, 385 U.S. 630 6

California v. *Green*, 399 U.S. 149 5

Dutton v. *Evans*, 400 U.S. 74 6

Hoffa v. *United States*, 385 U.S. 293 7

Lumetta v. *United States*, 362 F.2d 644 7-8

Rogers v. *Lodge*, 458 U.S. 613 6

Tennesee v. *Street*, No. 83-2143 (May 13, 1985) 5, 6

United States v. *Bailey*, 444 U.S. 394 7

United States v. *Doe*, No. 82-786 (Feb. 28, 1984) 6

United States v. *Garguilo*, 554 F.2d 59 7

United States v. *Walker*, 479 F.2d 407 7

Page

Constitution, statute and rule:

U.S. Const. Amend. VI (Confrontation Clause) 6

26 U.S.C. 7203 ..... 2, 5, 8

Fed. R. Evid. :

Rule 801(c) 6

Rule 801(d)(1)(A) 5, 6

Rule 801(d)(2)(A) 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1332

K. JANELLE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1352

TONY D. BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (84-1332 Pet. App. 1a-6a)[1] is unreported.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on November 30, 1984. A petition for rehearing in both cases was denied

---

[1]Hereafter, "Pet. App." will refer to the appendix to the petition in No. 84-1332 unless otherwise noted.

on January 24, 1985 (Pet. App. 7a; 84-1352 Pet. App. 7a). The petition for a writ of certiorari in No. 84-1332 was filed on February 20, 1985. The petition for a writ of certiorari in No. 84-1352 was filed on February 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners Janelle Blauvelt and Tony Blauvelt were convicted on three counts of wilfully failing to file income tax returns for the years 1978, 1979, and 1980, in violation of 26 U.S.C. 7203. Petitioner Janelle Blauvelt was sentenced to 30-days' confinement at a half-way house, was fined $1,500, and was placed on probation for a period of four years to begin upon her release from confinement. Petitioner Tony Blauvelt was sentenced to a one-year term of imprisonment, was fined $2,500, and was placed on probation for a period of five years to begin upon his release from confinement. The court of appeals affirmed (Pet. App. 1a-6a).

1. a. Petitioners are husband and wife, and they lived together for the years 1978-1980 (Pet. App. 2a; Tr. 63-64, 313-314). During that period, both were gainfully employed, and each realized sufficient income to require the filing of federal income tax returns (GX 24, 26, 28, 30-38, 40, 42, 44, 55; Tr. 65-68, 81, 89-91, 194-201, 232-233, 294).[2] However,

---

[2]Petitioners' combined gross income for the years in question was as follows (Pet. App. 2a; GX 55; Tr. 194-200):

1978:	$70,664.96
1979:	$101,722.72
1980:	$119,654.79

Given the community property laws of Texas, where petitioners lived during this period (Tr. 320), each petitioner was required by federal law to report as taxable income one-half of this combined gross income (Pet. App. 2a-3a).

neither petitioner filed a separate or a joint federal income tax return for those three years (GX 1-3; Tr. 108, 112-113; 301).

The evidence adduced at trial showed that petitioners' failure to file these returns was wilful. Internal Revenue Service records proved that petitioners had filed joint returns (Form 1040) in 1974, 1975, and 1976 (GX 20-22; Tr. 103-107, 116, 233).[3] Petitioner Tony Blauvelt is a sales representative, holds a bachelor's degree in chemical engineering, and has pursued postgraduate studies in law, taxation, and other areas (Pet. App. 2a; Tr. 257, 307-308). He had taken a college-level course on the preparation of federal income tax returns and knew from that course that the federal income tax laws required him to file a return for the years in question (Pet. App. 2a; Tr. 167, 174, 242-243, 257, 301-302, 314).[4] Petitioner Janelle Blauvelt had attended college (but did not receive a degree) and was employed as a secretary for a construction company, but had experience in bookkeeping, which she performed for her employer (Pet. App. 2a; Tr. 125-126, 130-132, 315). In that capacity, among other things, she was responsible for calculating and deducting F.I.C.A. and federal withholding tax from employees' paychecks (Pet. App. 2a; Tr. 125-126, 130-132).

---

[3]Petitioners' returns for those years reflected the following amounts of adjusted gross income (Tr. 103-107):

1974:	$14,583
1975:	$12,562
1976:	$20,557

However, petitioner Tony Blauvelt filed his 1975 and 1976 returns only after being ordered by the United States District Court for the Northern District of Texas to comply with an IRS administrative summons requesting him to produce various documents relating to those tax years (GX 46-48; Tr. 138-157, 238).

[4]Petitioner Tony Blauvelt also holds a real estate broker's license and an employment agency license (Tr. 310-313).

b. Prior to trial, petitioner Tony Blauvelt voluntarily testified before the grand jury. In that testimony, he claimed that he was entitled to be absolved from all liability for failing to file income tax returns for the years in question on the ground that the IRS has historically declined to prosecute executors and trustees for their failure to submit required tax returns (5/3/83 Tr. (Tony Blauvelt) 12-35; see also Tr. 381-386). Tony Blauvelt also testified at trial. This time, however, he claimed that he had failed to file the returns because of his fear that, had he done so, he might incriminate himself (Tr. 279-282, 303-304, 306, 327-328, 335). In this regard, he stated that his fear was based upon a warning that he had received from an IRS official at the time that he filed his 1976 return (Tr. 248-249, 318, 327-328; see Pet. App. 3a; see also page 3 note 3, *supra*), and he also maintained that the tax return forms were too complex for him to complete without doing so erroneously and unlawfully (Pet. App. 3a; Tr. 236, 238, 307-312).

On cross-examination, the prosecutor, in order to impeach petitioner's testimony, brought out the fact that petitioner did not rely upon that excuse for his failure to file a return when he voluntarily testified before the grand jury (Tr. 304, 351-352, 354-357, 381-386). The government pursued this line of inquiry to show that petitioner's trial testimony was a recent fabrication (Tr. 428).

2. The court of appeals affirmed the convictions of both petitioners in an unpublished opinion (Pet. App. 1a-6a). The court found (*id.* at 3a-4a) that, given petitioners' education, business experience, and history of filing prior federal income tax returns, there was sufficient evidence to allow the jury to find that petitioners had wilfully failed to file a federal income tax return for the years in question. Moreover, the court held (*id.* at 5a) that any misuse by the government of petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial was harmless

beyond a reasonable doubt, assuming that any error occurred at all. The court also rejected without discussion (*id.* at 6a) petitioners' claim that the government had misled the grand jury regarding the proper meaning of the term "wilful" for purposes of 26 U.S.C. 7203.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Both petitioners contend (84-1332 Pet. 3-22, 29-30; 84-1352 Pet. 14-26) that the government violated their Confrontation and Due Process Clause rights by using petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial. That claim lacks merit.[5]

Contrary to petitioner's repeated assertions, the government did not improperly introduce prejudicial evidence before the jury. Rather, the government merely elicited from petitioner the fact that he had voluntarily testified before the grand jury and had been afforded a full opportunity to explain his failure to file the required tax returns, but had omitted from his grand jury testimony the excuse

---

[5]Petitioner Janelle Blauvelt erroneously asserts (84-1332 Pet. 3-22) that her rights were violated by the government's use of her husband's grand jury testimony to impeach his trial testimony. Both at the time of the impeachment (Tr. 372-373) and at the close of the evidence (Tr. 484-485; see also Tr. 482), the district court instructed the jury that it could consider this evidence only in connection with her husband and not as proof of her guilt. Moreover, because her husband's grand jury testimony was not hearsay (see Fed. R. Evid. 801(d)(1)(A) (prior, sworn inconsistent statement)), and because he was available for cross-examination regarding his statements, admission of that testimony did not violate her rights under the Confrontation Clause. See *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5; *California* v. *Green*, 399 U.S. 149 (1970).

for his nonfeasance that he offered at trial (see page 4, *supra*). This line of questioning was an entirely proper effort to show that petitioner's trial testimony was a recent fabrication. See *Anderson* v. *Charles*, 447 U.S. 404 (1980). Nor was that evidence hearsay. Petitioner's own statements (Tr. 386) were admissible either as admissions (Fed. R. Evid. 801(d)(2)(A)) or as prior, sworn inconsistent statements (Fed. R. Evid. 801(d)(1)(A)). The statements of the prosecutor and the grand jurors (Tr. 377, 386) were not hearsay because they were offered simply to show that petitioner had been advised of his rights, not to prove the truth of the matters asserted therein. See Fed. R. Evid. 801(c); *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 4; *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974).[6]

2. Petitioner Janelle Blauvelt contends (84-1332 Pet. 22-29) that the evidence is insufficient to support her convictions for wilfully failing to file a federal income tax return. She does not deny that she failed to file a tax return for the years in question; rather, her claim is that the evidence does not support the jury's finding that her failure to do so was wilful. However, both the district court (Tr. 226, 405-406) and the court of appeals (Pet. App. 4a) found that the evidence was sufficient to support petitioner's convictions. Given these concurrent factual findings by both lower courts, review by this Court of petitioner's fact-bound claim is unwarranted. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

---

[6]For that reason, petitioner Tony Blauvelt's Confrontation Clause claim must also fail. See *Tennessee* v. *Street*, slip op. 5; *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) (plurality opinion).

[7]In any event, as the court of appeals explained (Pet. App. 4a), the government adduced sufficient circumstantial evidence to support the finding that she wilfully failed to file the returns in question (pages 2-3,

3. Petitioner Tony Blauvelt maintains (84-1352 Pet. 6-14) that the prosecutor misled the grand jury regarding the correct meaning of the term "wilful" for purposes of 26 U.S.C. 7203. That claim also lacks merit.

Petitioner relies upon one statement made by the prosecutor to the grand jury during the testimony of an IRS agent in which the prosecutor commented upon the elements of 26 U.S.C. 7203[8] as the basis for his claim (84-1352 Pet. 8) that the government "destroyed [his] presumption of innocence" and misled the grand jurors "into believing that a non-filer, with substantial earnings, was more guilty than a party who did not owe any tax." However, petitioner has mischaracterized the prosecutor's statement. That statement does not suggest that petitioner should be indicted simply because he owed a substantial amount of tax. At most, the remark simply suggests that the existence of a substantial tax liability is probative evidence of wilfulness, and that is a correct statement of the law. See, *e.g., United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977); *United States* v. *Walker,* 479 F.2d 407, 409 (9th Cir. 1973); *Lumetta* v. *United States,*

---

supra). See *United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977). Petitioner's defense was that she lacked access to information regarding her husband's income (Pet. App. 4a; 84-1332 Pet. 24-29). However, the only evidence supporting that defense was the trial testimony of her husband (Pet. App. 4a; Tr. 287), whom the jury was entitled to disbelieve. See *United States* v. *Bailey,* 444 U.S. 394, 414-415; *Hoffa* v. *United States,* 385 U.S. 293, 311 (1966). Petitioner also made no effort during that period to obtain the necessary information from her husband or to seek advice as to whether and how to file a partial return. Pet. App. 4a; Tr. 282-283.

[8]The statement is as follows (5/3/83 Tr. (Beatrice Casterline) 10-11):

> Keep in mind, that's not something the government has to prove. We don't have to prove that he owed any tax. Generally they're not referred for prosecution unless there's a substantial amount owed. It also shows willfulness. If a person didn't owe any tax, he might in good faith argue that he didn't owe any tax and didn't have to file a tax return.

362 F.2d 644, 645-646 (8th Cir. 1966). Furthermore, the prosecutor instructed the grand jury at other points during the proceedings that, to prove an offense under 26 U.S.C. 7203, the government was required to show that petitioners were required to file a tax return, that they failed to do so, and that their failure was wilful (5/3/83 Tr. (Beatrice Casterline) 2-3; 5/3/83 Tr. (Tony Blauvelt) 6, 11). Accordingly, because the grand jury was correctly informed as to the elements of the offense of wilfully failing to file a federal income tax return, the district court properly denied petitioner's motion to dismiss the indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ALAN HECHTKOPF
FRANCIS M. ALLEGRA
Attorneys

MAY 1985

DOJ-1985-05

Office-Supreme Court, U.S.
FILED
JUN 5 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION

MICHAEL LOUIS MINNS
MICHAEL LOUIS MINNS, P.L.C.
20214 Braidwood, Suite 100
Katy, Texas 77450
(713) 578-3588

Attorney for Petitioner,
K. Janelle Blauvelt

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

TABLE OF CONTENTS

	Page
Table of Authorities	I
Statement Response	1
Argument Response	2
Conclusion	7

TABLE OF AUTHORITIES

CASES

	Page
Bartley v. U.S., 319 F.2d 717, (Dist. of Col. Cir. 1963)	6
Dutton v. Evans, 91 S.Ct. 210 (1970)	6
Tennessee v. Street, No. 83-2143 (May 13, 1985)	5, 6
Young v. U.S., 214 F.2d 232, (Dist. of Col. Cir., 1954)	6

NO. 84-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION

Statement Response

The basis of the Government's argument rests on portions of its "statement" which are unsupported by the record and in fact, untrue. In fact, the allegations are so ridiculous, this Court can take judicial notice of the fact that they are untrue.

The premise of the Government is that Tony Blauvelt's attempt to make a legal argument to the Grand Jury, which was not legally rational, can be used later to impeach him (and therefore, destroy the credibility of the Petitioner's only witness) in trial. This premise is based on the faulty assumption that Tony Blauvelt ". . . had been afforded a full opportunity to explain his failure to file the required tax returns, . . ." (see Government's argument, page 5). The record does not reflect this. There are no references to the record reflecting this. This Court can take judicial notice of the fact that Federal Grand Jury investigations are generally controlled by the Attorney General.

Argument Response

The Government maintains Tony Blauvelt, the Petitioner's only witness, had a *full* opportunity to explain to the Grand Jury. This representation is patently dishonest. None of the Government's references support this. In fact, Mr. Blauvelt was cut off on several occasions during his two minutes before the Grand Jury, once by Mr. Wallace.

Even if he had been given this full opportunity, his failure to know that his fear of prosecution was his best defense is not a contrary position. The record does not reflect Mr. Blauvelt argued facts to the Grand Jury, only incompetent law.

The Government's attempt to categorize the statements of the prosecutor (who no longer works for the Government) as " . . . offered simply to show that Petitioner had been advised of his rights, not to prove the truth of the matters asserted therein." (See Government's response brief, page 6), is not only a dishonest

representation, but categorically absurd. If the Government wanted to prove Mr. Blauvelt had been told his rights and Mr. Wallace as prosecutor told the jury he had, this would clearly be a statement offered to prove the matters asserted, but the Government either intentionally wants to navigate this Court to the wrong waters or has just missed the boat completely.

The purpose of statements by the unsworn Government witness, Assistant Attorney General, Wallace, like: "Well, would it be safe would you agree with me having read that Grand Jury testimony and the information that you gave that Grand Jury was totally different from what you have given to these folks?", (transcript page 356), was to force the jury to choose between Mr. Wallace's version or Mr. Blauvelt's version, not merely prove he had told Mr. Blauvelt what his rights were. Mr. Wallace's "conduct", which the Fifth Circuit refused to exonerate, went uncross-examined and unimpeached, and in fact, was given from "an eyewitness", from a nearly unimpeachable source, an officer of the Court, and the attorney for the United States Government.

The Government's argument seeks to limit this Court's examination to the mere improper use of Grand Jury testimony claiming Mr. Blauvelt is not believeable because during the approximate two (2) minutes, this layman spent before the Grand Jury, Mr. Blauvelt, representing himself, asserted an unusual unsupportable legal theory. This "theory", as the trial Court found, was not inconsistent with his testimony at trial. The Government's entire defense for the improper use of this testimony was impeachment, yet as the Court ruled, his Grand Jury testimony did not impeach his trial testimony. The

record does not reflect that, but the record does reflect *the persistent suggestion of Wallace* that something improper had been done by the Petitioner's only witness, Tony Blauvelt, in front of the Grand Jury which had indicted him and the Petitioner, and that Wallace had caught him, so he changed his story, (see Petitioner's brief and supra). The only "impeachment" was the "testimony" of the Attorney General, not the Grand Jury statements. This "impeachment" was improper and dishonest.

The fact that the "testimony" came not only from the Grand Jury, (according to the implications of Wallace), but from the Attorney General personally, is of great importance.

Blauvelt's statements were admitted as prior inconsistent statements, which they were not. The Government now contends they should also be admitted as admissions, although they weren't offered as admissions. In any event, admissions of what? That he believed he was a scapegoat? Blauvelt's statement to the Grand Jury that he was a scapegoat is in no way inconsistent with his testimony that he had been threatened with criminal prosecution (in light of the subsequent trial and conviction, a highly credible position), the Government now calls "a recent fabrication".

Finally, the Government's curious new representation that hearsay isn't hearsay must be examined.

The Government states two (2) of its seventy-five (75) Grand Jury references were innocent efforts to prove the witness had been advised his rights "not to prove the truth of the matters asserted therein." Assuming arguendo that this could possibly be relevant or that the remaining

seventy-three (73) references to the Grand Jury would not be prejudicial, wasn't Mr. Wallace's statement telling the jury he had told Mr. Blauvelt his rights, an effort to support the truth of his implied assertions that he was a "fair" and honest prosecutor and that the jury could believe him? Wasn't it really additional testimony?

The Government's efforts to distinguish this case from the United States Court of Appeals for the District of Columbia's clear decisions supporting the Petitioner's position seem to be based primarily on this Court's recent holdings in *Tennessee v. Street*, (No. 83-2143) (May 13, 1985), which the Government obviously for purposes of emphasis repeats on page 5 of its brief and page 6.

Unfortunately, the Government makes no specific references to the case because it does not support the Government's position, in fact, the rationale behind the *Tennessee* decision tends to support Petitioner's position, clearly demonstrating this Court's strong support for the confrontation clause of the Constitution stating in relevant part:

> "The clause's fundamental role in protecting the right of cross-examination was satisfied by the Sheriff's presence on the stand."

(In the instant case, the source of the statements, Wallace, did not take the stand); and also, in Justice Brennan's concurring opinion supported by Justice Marshall, ". . . the record contains no suggestion that the State was engaged in any improper effort to place prejudicial hearsay evidence before the jury."

In the instant case, the record not only makes the suggestion, it shouts it out. *Tennessee* does not deal with

improper Grand Jury references and implications, nor does it deal with improper Government "testimony". The instant case does.

The Government now argues that the author of the *Tennessee* decision, the Chief Justice of the Supreme Court of the United States, no longer supports the position he concurred with, in *Bartley v. U.S.*, 319 F.2d 717, (Dist. of Col. Cir. 1963), [attacking unacceptable hearsay and supporting *Young v. U.S.*, 214 F.2d 232, (Dist. of Col. Cir., 1954) a case on point with the instant case], and no longer supports this entire Court which clearly spelled out in its recent opinion (*Tennessee* supra) strong support for the confrontation clause.

In another of the Government's cases, *Dutton v. Evans*, (see 91 S.Ct. 210, 1970), Justice Harlan in his concurring opinion summed up a large portion of the problem in the instant case: .

> "The question in each case, therefore, was whether there had been adequate 'confrontation' to satisfy the requirement of the clause."
>
> (Confrontation clause).

There was nothing to impeach in the record, (the rationale in *Tennessee* coupled with safeguards). The statements were entirely consistent. There was no confrontation or method of confronting Mr. Wallace's statements such as; ". . . Would you agree with me . . .?"

Justice mandates that this Court of final jurisdiction not agree with Mr. Wallace.

Conclusion

For all of these reasons stated herein and in Petitioner's Brief, either a judgment of acquittal or a new trial for the Petitioner should be granted.

Respectfully submitted,

MICHAEL LOUIS MINNS, P.L.C.

By: _____

MICHAEL LOUIS MINNS
20214 Braidwood, Suite 100
Katy, Texas 77450
(713) 578-3588

Attorney for Petitioner,
K. Janelle Blauvelt